1987

American Roofing Company and/or Employer's Mutual Liability v. George Roy Green, the Industrial Commission of Utah and the Second Injury Fund : Brief of Respondent

Utah Court of Appeals

IN THE COURT OF APPEALS, STATE OF UTAH

AMERICAN ROOFING COMPANY AND/OR EMPLOYER'S MUTUAL LIABILITY, Petitioners/Appellants, vs. GEORGE ROY GREEN, THE INDUSTRIAL COMMISSION OF UTAH AND THE SECOND INJURY FUND, Respondents.	:	Court of Appeals Case No. 870189-CA Category No. 6

BRIEF OF RESPONDENT GEORGE ROY GREEN

Petition for Review of an Order of
the Industrial Commission of the State of Utah

Honorable Gilbert A. Martinez, Administrative Law Judge

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JURISDICTION

Jurisdiction to review final orders of the Utah State Industrial Commission is granted to the Utah Court of Appeals pursuant to §78-2a-3, Utah Code Ann.

DETERMINITIVE PROVISIONS

Section 35-1-75, Utah Code Ann., is determinitive in resolving the issue relating to an injured employee's rate of compensation. A copy of this provision is set forth in the Addendum.

STATEMENT OF FACTS

In September, 1985, George R. Green was an employee of American Roofing Company. He had been employed for three years as a roof repairman. (R. 50) Green was compensated by American Roofing at a wage rate of $15.47 an hour. (R. 34) During the

14 weeks preceding his industrial accident, Green worked approximately 13 hours each week. (R. 34)

At the time of the occurrence giving rise to his claim for benefits, Green was suffering from advanced degeneration of his lumbar discs with large hypertrophic spurs. (R. 247) Green claims he sustained a compensable accident on September 6, 1985. Additionally, he claims that as a result of this industrial accident, he is permanently and totally disabled.

At approximately 1:00 p.m. on September 6, Green was unloading debris which he had generated repairing roofs that morning. The debris, gravel, leaves and asphalt, was contained in a five gallon bucket which was located in the center of the bed of his pickup truck. (R. 22-24) Green estimated the weight of the filled bucket to be approximately 30 pounds.

Standing beside the pickup truck, Green leaned over the side of the truck and lifted the bucket. As he was removing the bucket from the truck, it snagged onto another bucket. When this occurred, Green experienced "terrific pain" in his lower back. (R. 24-25) For a minute or two he was motionless, hanging on to the side of the truck.

After the passage of several minutes, Green was able to get into his car and drive home. He did not complete his job responsibilities that day, and he has been unable to return to work. (R. 26-27)

George Green was admitted to Holy Cross Hospital on September 25, 1986 for a lumbar myelogram and a CT scan. After

these diagnostic studies were completed, it was determined that Green suffered from disc herniations at levels L2-L3, L3-L4, L4-L5, and L5-S1. (R. 246) Thereafter, he was admitted to Holy Cross Hospital for medical procedures to relieve the discomfort caused by the buldging discs.

Prior to the September 6, 1985 occurrence, Green was able to engage in those activities necessary to repair roofs. He was able to lift up to 100 pounds. (R. 79) Following his injury, Green was able to lift only 7 pounds. (R. 80)

Prior to the September 6, 1985 incident, Green experienced stabbing pains down his leg. These pains would "hit and then it would go away." (R. 64)

Green characterized the pain he experienced on September 6, 1985 as "a lot worse." (R. 64) It was a constant pain, or as Mr. Green described it, "it stayed right there."

After the hearing, Mr. Green was referred to a medical panel chaired by Dr. Thomas Bauman. (R. 245) Dr. Bauman rendered an opinion that the incident of September 6, 1985 "contributed to the permanent degenerative problem which is now evidenced in [Green's] low back." (R. 247) Dr. Bauman believed that Green's low back difficulties translated into a 24% permanent physical impairment. One third of this was attributable to the accident of September 6, 1985. (R. 247) Green was advised by Dr. Bauman to avoid frequent lifting of over 10 pounds and occasional lifting above the waist of over 25 pounds. (R. 248)

Following Mr. Green's evaluation by the medical panel, Mr. Green was referred to the Utah State Division of Rehabilitation Services. Richard Olsen, a rehabilitative counselor, rendered an opinion that in light of Mr. Green's limited academic background, lack of transferable skills and continuing medical problems, he was not a feasible candidate for rehabilitation. (R. 255)

Based upon the record, Judge Martinez rendered his findings of fact, conclusions of law and order finding George Green to have sustained a compensable industrial accident, thereby entitling him to a finding of permanent total disability pursuant to Section 35-1-67, Utah Code Ann. These findings were confirmed upon review by the Utah State Industrial Commission. A copy of Judge Martinez' order, a supplemental order and the order of the Utah State Industrial Commission are appended to appellants' brief.

SUMMARY OF ARGUMENT

The Utah Court of Appeals reviews decisions of the Utah State Industrial Commission to insure that they are reasonable and consistent with statutory provisions.

The Commission decision that George R. Green sustained a compensable industrial accident falls within the limits of reasonableness.

Green did not expect to sustain a disabling injury when he lifted a bucket of debris from his truck. The exertion

which resulted in his injury was more substantial than that engaged in by a typical twentieth century person.

The Industrial Commission properly computed Green's compensation rate based upon his average weekly wage.

ARGUMENT

POINT I

A REVIEWING COURT MUST UPHOLD THE INDUSTRIAL COMMISSION'S INTERPRETATION OF ITS STATUTE IF THE INTERPRETATION FALLS WITHIN THE LIMITS OF REASONABLENESS AND RATIONALITY.

In reviewing administrative decisions, an appellate court affords great deference to the technical expertise and more extensive experience of the administrative agency. The construction of statutes by governmental agencies charged with their administration is given great weight. Utah Dept. of Administrative Services v. Public Service Comm., 658 P. 2d 601 (Utah 1983).

A reviewing court is not permitted to substitute its own preference for policy judgments for those of the Commission. Thus, an appellate court reviews agency decisions to assure that "they fall within the outer limits of reasonableness as measured by the statutory language, purpose and policy . . ." supra at 611. Only if it can be said that the decision of the Industrial Commission is wholly outside the boundary of reasonableness and rationality should its decision be reversed. Taylor v. Industrial Commission, 65 U.A.P. 20 (September 16, 1987).

POINT II

AN INTERNAL FAILURE OCCURS BY ACCIDENT IF IT IS UNEXPECTED.

The Utah Supreme Court recently set guidelines to be applied in determining whether an injury constitutes a compensable industrial accident. Allen v. Industrial Commission, 729 P. 2d 15 (Utah 1986). A two step procedure is applied. First, the finder of fact must determine whether the injured worker sustained an accident. If so, a determination must then occur whether a causal connection exists between the injury and the worker's employment duties.

Appellants contend that the injury occurring to George Green on September 6, 1985 did not occur by accident and, further, if it had, a causal connection between the injury and the worker's duties was not shown.

Mr. Green sustained an internal failure when he lifted a bucket of debris in September of 1985. If an ordinary or usual exertion results in an unexpected injury, the injury occurs by accident. The critical inquiry is whether the exertion causes an unplanned or unintended result. The term "by accident" does not require an unusual event. The basic and indispensable ingredient of an accident is unexpectedness. Allen v. Industrial Commission, supra.

Appellants contend that George Green had experienced similar pain in his low back on occasions prior to the the

September 6, 1985 injury, and, therefore, the injury he sustained on that day was not an unexpected result from an exertion. It is true that Mr. Green experienced back pain from time to time prior to his disabling injury. Mr. Green had been employed by American Roofing for several years prior to his injury. During that time, he had repeatedly engaged in roof repair work. He experienced pain while performing the duties of his job, but this pain subsided. The more intense pain experienced by George Green in September, 1985 did not subside. It did not subside because the exertion on that day damaged his lumbar spine. The injury to his spine was sufficiently severe to render him permanently disabled. The record does not support the conclusion that George Green expected to receive a disabling injury when he lifted a bucket of debris from his truck. Rather, the record supports the Commission's conclusion that Mr. Green had worked for several years repairing roofs and that he believed he could continue to do so without experiencing a disabling injury to his lumbar spine. The Commission's conclusion that George Green sustained an injury by accident is within the limits of reasonableness and rationality.

POINT III

THE UTAH INDUSTRIAL COMMISSION REASONABLY CONCLUDED THAT A CAUSAL CONNECTION EXISTS BETWEEN THE INJURY AND GREEN'S DUTIES.

When George Green became employed with American Roofing, he suffered from a bad back. This preexisting back condition subjects an injured worker to different causation

requirements than those imposed upon a worker without pre-existing medical conditions. The legal causation requirement and medical causation requirement applicable to workers suffering from preexisting conditions are set forth in the Allen decision. Appellants do not contest that Green has satisfied the medical causation test. Under the medical causation test, Green had the burden of showing that the exertion of his occupation resulted in the disabling injury. The medical panel physician, Dr. Thomas Bauman, concluded that the exertion required by Green's employment contributed to the advanced degeneration of his lumbar discs.

Mr. Green's employer takes exception to the Industrial Commission's conclusion that Green's employment duties were the "legal" cause of his injury.

Mr. Green's employer does not take exception with the legal principle that the aggravation of a preexisting condition may constitute a compensable industrial accident. Yet, under the legal causation requirement, a claimant with a preexisting condition must show that his "employment contributed something substantial to increase the risk he already faced in everyday life because of his condition." Allen, supra at 25. The legal causation requirement is designed to distinguish those risks encountered in everyday life from those risks that are incident to one's employment. An objective standard is used when comparing a particular employee's exertion with the usual wear and tear and exertions of nonemployment life.

This was done to provide a more consistent and predictable standard for the Utah State Industrial Commission. Certain exertions are believed to be typical exertions expected of men and women in the latter part of the twentieth century, i.e. "taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height, and climbing the stairs in a building." Allen, supra at 26.

In reviewing the conduct of the injured employee, the Industrial Commission reasoned that George Green was injured while engaging in an exertion more substantial than that engaged in by a typical twentieth century person. The Commission reasoned that weight alone is not the only criteria to be used in applying the Allen legal causation. The manner in which the lifting is done "can significantly increase strain on the body." The Commission observed that "the applicant was leaning over the side of the truck and pulling and lifting at the same time . . . ." The weight involved was significant and as the injured employee lifted this weight with his arms outstretched across the side of the truck, the bucket became snagged on another bucket. This placed additional strain on Green's back, thereby resulting in a disabling injury.

The Commission acted within the limits of reasonableness and rationality in concluding that the manner in which George Green attempted to lift a thirty pound bucket of debris removed his conduct from that of the typical twentieth century

person. This conclusion should not be reversed.

POINT IV

THE INDUSTRIAL COMMISSION CORRECTLY COMPUTED THE AVERAGE WEEKLY WAGE OF THE INJURED EMPLOYEE.

The benefits provided to an injured employee who sustains a disability are based upon his "average weekly wage." The formulas to calculate the average weekly wage of disabled employees are set forth in Section 35-1-75, Utah Code Ann. Subsection 1 of Section 75 sets forth various methods to be followed in determining an employee's average weekly wage depending on whether the wages are fixed by the hour, day, week, etc. See Produce v. Industrial Commission of Utah, 657 P.2d 1354 (Utah 1983). Part (e) of subsection 1 provides:

> "If at the time of the injury the wages are fixed by the hour, the average weekly wage shall be determined by multiplying the hourly rate by the number of hours the employee would have worked for the week if the accident had not intervened. In no case shall the hourly wage be multiplied by less than twenty hours for the purpose of determining the weekly wage."

George Green was a part-time employee. He was paid hourly at the rate of $15.47 per hour. No party has taken exception to the finding of the Administrative Law Judge that at the time of the industrial accident, Mr. Green worked 12 to 14 hours per week.

The statute at issue is not ambiguous. It requires that the hourly wage of an injured employee be multiplied by a number not less than 20 for the purpose of determining "the

employee's average weekly wage". This yielded an average weekly wage of $309.40.

In determining the benefit rate pursuant to Section 35-1-57, Utah Code Ann., Green's "average weekly wage" of $309.40 was multiplied by 2/3, yielding a compensation rate of $206.00. Because the compensation rate exceeded Green's actual wages of $201.11, a compensation rate in the amount of his actual wages was applied. (No exception was taken to the reduction of his compensation rate from $206 to $201.)

Mr. Green's employer objects to the decision of the Industrial Commission awarding him benefits at a compensation rate equal to his actual working wages at the time of his injury. The employer contends that such a ruling is unfair, for it serves as a disincentive to Mr. Green to return to work, and it gives preferential treatment to part-time employees who are hired for less than 20 hours per week.

The Industrial Commission consistently construes provisions of the Worker's Compensation Act in accordance with its purpose to alleviate a hardship upon workers and their families when disabling work related injuries occur. Baker v. Industrial Comm., 405 P.2d 613 (Utah 1965). As a result of a series of work related injuries, Mr. Green was found by the Industrial Commission to be permanently and totally disabled. The employer's concern that Mr. Green lacks sufficient incentive to return to work is unnecessary as the Commission has rendered its opinion that Mr. Green is unemployable in light of

his physical impairment, his training, and his age. The employer has taken no exception to the finding of the Commission that Mr. Green is unemployable.

It is undisputed that workers experience tremendous hardship when they sustain a disabling injury. The intent of the Worker's Compensation Act is to provide sustenance to an injured employee and his family during the time of need. Produce v. Industrial Commission of Utah, supra. Consistent with this purpose, a minimum compensation rate is established for part-time employees. The Commission assures all parties concerned that no windfall will occur to an employee by setting the maximum compensation rate at the actual wages earned by the employee at the time of his injury. Such a scheme is fair and consistent with the intent of the statute. It cannot be said that the Commission's calculation of Green's compensation rate is unreasonable in light of the clear directive set forth in §35-1-75, Utah Code Ann.

Regarding the final argument of the appellant regarding reimbursement, Mr. Green expresses no opinion as this issue concerns reimbursement of benefits paid to Mr. Green by the Second Injury Fund, a matter that does not concern an injured employee.

CONCLUSION

George Green respectfully requests that this Court affirm the decision of the Utah State Industrial Commission

awarding him lifetime benefits at a rate of $201 per week.

DATED this 19 day of November, 1987.

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CERTIFICATE OF MAILING

I hereby certify that I caused true and correct copies of the foregoing Brief of Respondent George R. Green to be mailed, postage prepaid, on the 20 day of March, 1987 to the following:

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ADDENDUM

35-1-75. Average weekly wage - Basis of computation.

(1) Except as otherwise provided in this act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute the weekly compensation rate and shall be determined as follows:

(a) If at the time of the injury the wages are fixed by the year, the average weekly wage shall be that yearly wage divided by 52.

(b) If at the time of the injury the wages are fixed by the month, the average weekly wage shall be that monthly wage divided by 4 1/3.

(c) If at the time of the injury the wages are fixed by the week, that amount shall be the average weekly wage.

(d) If at the time of the injury the wages are fixed by the date, the weekly wage shall be determined by multiplying the daily wage by the number of days and fractions of days in the week during which the employee under a contract of hire was working at the time of the accident, or would have worked if the accident had not intervened. In no case shall the daily wage be multiplied by less than three for the purpose of determining the weekly wage.

(e) If at the time of the injury the wages are fixed by the hour, the average weekly wage shall be determined by multiplying the hourly rate by the number of hours the employee would have worked for the week if the accident had not intervened. In no case shall the hourly wage be multiplied by less than 20 for the purpose of determining the weekly wage.

(f) If at the time of the injury the hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be the usual wage for similar services where those services are rendered by paid employees.

(g)(i) If at the time of the injury the wages are fixed by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen the wages, not including overtime or premium pay, of the employee earned through that employer in the first, second, third, or forth period of thirteen consecutive calendar weeks in the 52 weeks immediately preceding the injury.

(ii) If the employee has been employed by that employer less than thirteen calendar weeks immediately preceding the injury, his average weekly wage shall be computed as under Subsection (1)(g)(i), presuming the wages, not including overtime or

premium pay, to be the amount he would have earned had he been so employed for the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees, in a similar occupation.

(iii) If none of the methods in Subsection (1) will fairly determine the average weekly wage in a particular case, the Commission shall use such other method as will, based on the facts presented, fairly determine the employee's average weekly wage.

(2) When the average weekly wage of the injured employee at the time of the injury is determined as in this section provided, it shall be taken as the basis upon which to compute the weekly compensation rate. After the weekly compensation has been computed, it shall be rounded to the nearest dollar.